United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

W/affidavit

75-6141

To be argued by
NATHANIEL L. GERBER

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6141

MABEL DYSON BURKE,
Plaintiff-Appellant,

—v.—

SUPREME COURT, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES, SOCIAL SECURITY ADMINISTRATION, JAMES CARDWELL and JOSEPH KELLEY

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendants-Appellees Social Security Administration, Cardwell and Kelley.

NATHANIEL L. GERBER,
STEVEN J. GLASSMAN,
Assistant United States Attorneys, Of Counsel.

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UNITED STATES COURT OF APPEALS

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MABEL DYSON BURKE

Plaintiff-Appellant

-v-

SUPREME COURT, et al.,

Defendants-Appellees

BRIEF FOR DEFENDANTS-APPELLEES, SOCIAL SECURITY ADMINISTRATION, JAMES CARDWELL and JOSEPH KELLEY

PRELIMINARY STATEMENT

Mabel Dyson Burke (Ms. Burke) appeals from an order of the Honorable William C. Connor of the United States District Court for the Southern District of New York, filed November 19, 1975, dismissing her complaint in its entirety.

This brief is submitted on behalf of the federal agency and two federal officials who were sued in the District Court: the Social Security Administration

and James Cardwell, Commissioner of Social Security and Joseph Kelley, Regional Commissioner of Social Security for the New York Region (collectively referred to as the "federal appellees").

PROCEEDINGS BELOW

The complaint in this action, filed on December 5, 1974, alleges a general conspiracy on the part of twenty-eight named defendants to destroy Ms. Burke and her son, Reginald Burke, by

> "obstructing justice, perjury, concealment of criminal evidence, assault with intent to murder, violation of our constitutional rights, criminal harassment, violating the procedures of the courts, government and public offices***."

As to the federal appellees, Ms. Burke appears to seek damages and/or payments claimed to be owing from the Social Security Administration for: (1) the misspelling of Ms. Burke's name in the records of the Social Security Administration; (2) intentional delay in the payment of disability benefits to

Ms. Burke and (3) nonpayment of insurance benefits for Ms. Burke's allegedly disabled adult child.

On November 15, 1975 the District Court, per the Honorable William C. Connor, entered a memorandum and order dismissing the complaint as to all defendants.* Judge Connor construed the complaint as a civil rights action brought pursuant to 42 U.S.C. §§1983 and 1985. The complaint was dismissed on numerous grounds. As to the claims asserted by Ms. Burke on behalf of her son, Judge Connor held that

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* Judge Connor's decision is appended to this brief. Page references thereto are hereafter cited as (A-). Judge Connor's decision was in response to the motions filed by several of the defendants including the federal appellees for an order dismissing the complaint. The motion of the federal appellees was based upon their contention that the complaint failed to state a claim over which the District Court had jurisdiction or upon which any relief could be granted. More particularly, it was contended that if the complaint were construed as an action in tort, it failed to state a cause of action under the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. and further that the action was barred by the personal immunity of the individual federal appellees. Alternatively, if the complaint were construed as seeking judicial review under the Social Security Act, 42 U.S.C. §§405(g) and (h), it was barred by Ms. Burke's failure to exhaust her administrative remedies, the time for which has long since expired.

she could not sue for the deprivation of her adult son's civil rights. With respect to Ms. Burke's personal claims, Judge Connor held that even under the liberal standards of construction accorded pro se complaints, the complaint failed to state a cause of action. Judge Connor also found that he could not identify a single cause of action cognizable by a federal court and that the complaint was subject to dismissal on the Court's own motion for failure to comply with the requirements of Rules 8(a) and 8(e)(1) of the Federal Rules of Civil Procedure.

ISSUES PRESENTED

1. Did the District Court properly dismiss the complaint for failure to comply with Rules 8(a) and 8(e)(1) of the Federal Rules of Civil Procedure;

2. Did the District Court properly dismiss the complaint with respect to the claims asserted in behalf of Ms. Burke's son on the ground that she cannot sue for the deprivation of her son's civil rights?

3. Did the District Court properly dismiss the complaint for failure to state a claim under the

Civil Rights Act, 42 U.S.C. §§1983 and 1985.

4. Does the complaint state a cause of action under any other statute?

ARGUMENT

POINT I

The District Court Correctly Found that the Complaint Failed to Comply with the Requirements of Rules 8(a) and 8(e)(1) of the Federal Rules of Civil Procedure

The District Court correctly characterized the numerous pleadings and affidavits submitted by Ms. Burke as a "rambling all but incomprehensible hodgepodge of allegations". (A-2) Specifically, the pleadings are devoid of any statement of the Court's jurisdiction or any statement of the claim showing that Ms. Burke is entitled to relief as is required by Rule 8(a). Similarly, Ms. Burke has completely ignored and utterly failed to comply with the requirement of Rule 8(e)(1) which requires a "simple, concise and direct" statement of each averment of a pleading.

As Judge Gurfein observed in Franklin v. Zuber, 56 F.R.D. 601, 603 (S.D.N.Y. 1972):

> "unless the pro se pleader sets forth, no matter how inelegantly,

> "a short and plain statement of the claim showing that the pleader is entitled to relief"*** he should not be permitted to waste the precious time of the public defendants, the Court or of himself."

Similarly here, public officials such as the federal appellees and indeed most of the other 25 named defendants must be protected from such unwarranted and totally unsupported charges contained in pleadings which totally ignore the Federal Rules. See Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949, (1950); Franklin v. Zuber, supra; Jezmura v. Belden, 281 F. Supp. 200, 204-207 (N.D.N.Y. 1968).

POINT II

The District Court was Correct in Dismissing the Complaint with Respect to the Claims Asserted in Behalf of Ms. Burke's Son

As the District Court correctly noted, it is well established that one cannot ordinarily sue for the deprivation of another's civil rights. See Aguayo v. Richardson, 473 F.2d. 1090, 1099-1100 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974);

National Organization for Women v. Goodman, 374 F. Supp. 247 (S.D.N.Y. 1974). Both 42 U.S.C. §1983 and 42 U.S.C. §1985, under which the District Court construed the action to lie, limit the right of action to the party actually injured or deprived of his civil rights. Accordingly, irrespective of the merits of the claim or claims asserted in behalf of the son, such claims can be brought only by the party allegedly injured, in this case the son.

POINT III

The District Court was Correct in Dismissing the Complaint for Failure to State a Claim Under the Civil Rights Act, 42 U.S.C. §§1983 and 1985

In order to bring a complaint within these statutes proscribing conspiracy to deprive persons of their constitutional and civil rights, particular acts must be alleged which show a conspiracy depriving the complaining party of the equal protection of the laws. Gillibeau v. City of Richmond, 417 F.2d 426 (9th Cir. 1969); Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973). Broad, general and conclusory allegations, unsupported by specific facts are in-

sufficient. Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971); Negrich v. Hohn, 379 F.2d 213, 215 (3rd Cir. 1967); Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1964). Nothwithstanding the undisputed principle that pleadings in civil rights actions are to be liberally construed, courts have dismissed causes of action under these statutes if the allegations did not relate to a deprivation of civil rights or were lacking in factual substance. See Avins v. Mangum, 450 F.2d 932 (2d Cir. 1971); United States ex rel Hyde v. Mc Ginnis, 429 F.2d 864 (2d Cir. 1970); Powell v. Workmen's Compensation Board, supra.

Although Ms. Burke charges that the federal appellees together with the other defendants have conspired to violate her constitutional and civil rights by destroying her and her son, she has not averred any facts in support of her conclusory allegations. Rather, as the District Court noted, Ms. Burke has alleged a series of apparently wholly unrelated affronts and injuries with a vague and conclusionary allegation of conspiracy between the

several persons suspected of being responsible. (A-5) Indeed, neither of the individual federal appellees is alleged to have personally participated in the conspiracy. Moreover, the Social Security Administration is not a "person" within the meaning of either statute and is therefore immune from suit thereunder. Egan v. City of Aurora, 365 U.S.514 (1961); Monroe v. Pape, 365 U.S. 167 (1961); Sykes v. State of California, 497 F.2d. 197, 201 (9th Cir. 1974); United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d. 84 (3rd Cir. 1969), cert. denied 396 U.S. 1046.

POINT IV

The Complaint Fails to State A Cause of Action Under Any Other Statute

It is arguable that Ms. Burke may have intended to bring an action in tort claiming negligence on the part of the federal appellees with respect to the allegedly delayed payment of her social security benefits or the alleged misspelling of her name in Social Security Administration records. Liberally construing the complaint as such for the sake of argument, plaintiff could have intended to sue the federal appellees only in their official

capacities inasmuch as neither of the individual federal appellees is alleged to have personally participated in the allegedly tortious acts.*

If Ms. Burke so intended, the cause of action would arise, if at all, under the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. ("FTCA"). However, to that extent, the action would be barred by 28 U.S.C. § 2680(a) of the FTCA which excepts from its ambit:

> Any claim...based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Clearly, both the determination of whether benefits should be awarded as well as the procedure whereby such determinations are made are matters within the

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* Regardless, since the determination of whether or nor to award social security benefits is within the range of both their official as well as discretionary functions, the individual federal appellees are immune from suit against them in their personal capacities. See Barr v. Matteo, 360 U.S. 564 (1959).

discretion of the Social Security Administration and thus exempt from suit under the FTCA. In any event, Ms. Burke's claim would fail since she never filed an administrative claim as is required by 28 U.S.C. §2675 of the FTCA.

Finally, if appellant intended to seek judicial review of a determination by the Social Security Administration of her entitlement to disability benefits, her claim would be barred for failure to exhaust administrative remedies pursuant to sections 205(g) and (h) of the Social Security Act, 42 U.S.C. §§405(g) and (h), the time for which has long since expired.*

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* In support of their motion to dismiss the complaint, the federal appellees submitted an affidavit by an official of the Social Security Administration. According thereto, Ms. Burke filed an application for disability benefits which was allowed by an Administrative Law Judge on October 19, 1972. Ms. Burke sought no further review of that favorable decision and thereby failed to exhaust her administrative remedies. Accordingly, Ms. Burke has not satisfied the conditions precedent to judicial review of the administrative determination prescribed by 42 U.S.C. §§405(g) and (h) and the District Court would therefore lack jurisdiction to entertain her claim. See Whipp v. Weinberger, 505 F.2d. 800 (6th Cir. 1974); Hazzard v. Weinberger, 382 F. Supp. 225 (S.D.N.Y. 1974).

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CONCLUSION

The order of the District Court dismissing the complaint with respect to the federal appellees should be affirmed.

Dated: New York, New York

March 15, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the Federal Appellees

NATHANIEL L. GERBER
STEVEN J. GLASSMAN
Assistant United States Attorneys

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MABEL DYSON BURKE, Plaintiff,	:	74 Civ. 5312 (WCC)
- against -	:	Pro Se
SUPREME COURT, CRIMINAL COURT, CIVIL COURT, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF CORRECTIONAL SERVICES, POLICE DEPARTMENT, DISTRICT ATTORNEY'S OFFICE, HOUSING DEVELOPMENT ADMINISTRATION, ATTORNEY GENERAL'S OFFICE, MAURICE NADJARI, PAUL J. REGAN, JOHN J. WALSH, JAWN SANDIFER, JAMES MORRIS, MURRAY J. DIAMOND, MICHAEL CODD, MICHAEL GOLDSCHMID, DAVID LEWIS, RICHARD KUH, EARDELL RASHFORD, SHYLEUR BARRACK, EDWARD THOMPSON, JAMES CARDWELL, JOSEPH J. KELLY, WALLACE RICE, WILLIAM CASHEL, SANDRA PAGE, MARVIN PENSTEIN, Defendants.	:	MEMORANDUM AND ORDER

CONNER, D. J.:

In what is apparently a pro se civil rights action brought pursuant to 42 U.S.C. §§ 1983 and 1985, Mabel Dyson Burke has sued twenty-eight named defendants, charging a conspiracy to "destroy" her son, Reginald Burke, a/k/a Ibn Allah, and herself, by

> "obstructing justice, perjury, concealment of criminal evidence, assault with intent to murder, violation of * * * constitutional rights, criminal harassment, violating the procedures of the courts, government and public offices * * * ."

Mrs. Burke charges that the wrongful acts on the part of the conspirators have resulted in severe mental stress with resulting serious physical consequences to herself and her son and she seeks redress in the form of money damages.

Presently before the Court are motions by a number of the named defendants to dismiss the complaint and by Mrs. Burke to amend her complaint to add a number of additional conspirators.

I.

My struggle through the rambling, all but incomprehensible hodgepodge of allegations contained in the many pages of legal size, single-spaced pleadings and affidavits submitted by Mrs. Burke portrays the picture of a heartbroken mother who has been frustrated and humiliated by her inability to cope with her environment or her son's frequent confrontations with the police. Out of her despair has apparently sprung the conviction that there is a far-reaching conspiracy to destroy her son and herself.

Mrs. Burke appears to believe that the conspiracy has three objects: (1) to destroy her and her son's confidence in democratic procedures, (2) to subject her to such stress and anxiety that she will die before obtaining an adjudication of a workmen's compensation claim which she states is presently pending, and (3) to murder her son, who has already been confined, allegedly without cause, in a mental institution.

The purported conspirators include Mrs. Burke's landlord, who allegedly has failed to provide adequate maintenance of her apartment and has sought unlawfully to evict Mrs. Burke on many occasions; Sandra Page, a 19-year-old girl who is claimed to have assaulted Mrs. Burke, at the instance of her landlord; judges, attorneys, state and federal administrative agencies, their supervisors and some of their other personnel, who are charged with either mishandling Reginald Burke's legal problems or ignoring Mrs. Burke's pleas for protection or assistance in her battles with Sandra Page, her landlord, the Social Security Administration and the Workmen's Compensation Board.

II.

With respect to the claims asserted by Mrs. Burke on behalf of her son, it is well settled that one cannot ordinarily sue for the deprivation of another's civil rights. See Aquayo v. Richardson, 473 F.2d 1090, 1099-1100 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974); National Organization for Women v. Goodman, 374 F.Supp. 247 (S.D.N.Y. 1974). Accordingly, to the extent that this action is brought on behalf of Reginald Burke, who is an adult, it is dismissed.

It should be made clear that this dismissal in no way reflects upon the possible merit of a civil rights claim brought personally by Mrs. Burke's son.

III.

With respect to Mrs. Burke's personal claims, the standards against which the various defendants' motions to dismiss will be tested are familiar ones. All the material allegations of the complaint must be deemed as true, Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965); Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir.), cert. denied, 400 U.S. 853 (1970), and the complaint will not be dismissed unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of her claims. Conley v. Gibson, 355 U.S. 41, 47-48 (1951); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284, 287-88 (2d Cir. 1971); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968). Moreover, since this is a pro se action, the pleadings will be construed with particular generosity. Haines v. Kerner, 404 U.S. 519 (1972); Jackson v. Statler Foundation, 496 F.2d 623, 625-26 (2d Cir. 1974). However, where, even under this liberal standard, a cause of action is not stated, the action must of course be dismissed. Federal courts have dismissed causes of action under the Civil Rights Act where the allegations did not relate to a deprivation of civil rights or were so lacking in factual substance as to be patently frivolous. See United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970).

IV.

Without tracing in detail the limitations imposed upon this Court's power, both jurisdictional and remedial, suffice it to say that I have carefully considered the allegations of the complaint and cannot identify a single cause of action cognizable by a federal district court. For example, a cause of action under 42 U.S.C. § 1985 is not made out merely by alleging a series of apparently wholly unrelated affronts and injuries with a vague and conclusory allegation of conspiracy between the several persons suspected of being responsible. Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1964); see also Gillbeau v. City of Richmond, 417 F.2d 426, 428-30 (9th Cir. 1969); Jemzura v. Belden, 281 F.Supp. 200, 206-07 (S.D.N.Y. 1968).

Among other reasons, the complaint in this case could be dismissed on the Court's own motion for failure to comply with the requirements of Rule 8(a), F.R.Civ.P., i.e., that a pleading must contain "a short and plain statement" showing the basis of the Court's jurisdiction and that the pleader is entitled to relief. Nor has Mrs. Burke satisfied Rule 8(e)(1), which requires a "simple, concise and direct" statement of each averment of a pleading. See discussion in 2A Moore's Federal Practice ¶ 8.13 (2d ed. 1974); Jemzura v. Belden, supra at 204; Curry v. Ragan, 257 F.2d 449 (5th Cir.), cert. denied, 358 U.S. 851 (1958). I am reminded of Judge Gurfein's observation in

Franklin v. Zuber, 56 F.R.D. 601, 603 (S.D.N.Y. 1972), that

> "unless the pro se pleader sets forth, no matter how inelegantly, 'a short and plain statement of the claim showing that the pleader is entitled to relief' * * * he should not be permitted to waste the precious time of the public defendants, the Court or of himself."

Particularly where public officials are involved, the federal courts must be scrupulous to protect them from unwarranted and scurrilous charges by disgruntled citizens, which distract them from the proper performance of their governmental functions, by striking down complaints, even pro se complaints, which literally say nothing except by way of conclusion. See Franklin v. Zuber, supra at 603; Jemzura v. Belden, supra at 206-07. As Judge Learned Hand observed in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949, (1950):

> "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." 177 F.2d at 581.

The complaint in this case, despite its length, is strikingly short on substance. Most of the defendants are either never mentioned in the body of the complaint or merely referred to in passing as having conspired to destroy Mrs. Burke or her son. For example, New York City Police Commissioner

Michael Codd is never mentioned in Mrs. Burke's factual narrative. It is only in a concluding summary that she states:

> "Police Commissioner, Mr. Michael Codd [is sued] for $5,000.00 for not enforcing law and all his police officers involved fined for not preventing assaults and protecting me."

Likewise, Maurice Nadjari, Paul Regan, Judge Jawn Sandifer, James Morris, Michael Goldschmid, David Lewis, Richard Kuh, Judge Edward Thompson, James Cardwell, Joseph Kelly, William Cashel and Marvin Penstein are not alleged to have personally participated in the conspiracy but are sued merely because they hold responsible positions with a government bureau or agency from which Mrs. Burke feels she received shabby treatment. This type of scattergun approach is clearly unacceptable under the Civil Rights Act. See Jennings v. Davis, 476 F.2d 1271, 1274-75 (8th Cir. 1973); Adams v. Pate, 445 F.2d 105, 108-09 (7th Cir. 1971); Hopkins v. Hall, 372 F.Supp. 182, 183 (E.D. Okla. 1974); Furumoto v. Lyman, 362 F.Supp. 1267, 1274-75 (N.D. Calif. 1973).

Moreover, there are other fundamental defects in the instant complaint which require its dismissal.

The Supreme Court, Criminal Court, Civil Court, Social Security Administration, Department of Correctional Services, Police Department, District Attorney's Office, Housing

Development Administration and Attorney General's Office are immune from suit under Sections 1983 and 1985 because they are not "persons" within the meaning of those statutes. Egan v. City of Aurora, 365 U.S. 514 (1961); Monroe v. Pape, 365 U.S. 167 (1961); Sykes v. State of California, 497 F.2d 197, 201 (9th Cir. 1974); United States ex rel. Gittlemacher v. County of Philadelphia, 413 F.2d 84 (3d Cir. 1969), cert. denied, 396 U.S. 1046 (1970). This leaves only Judge John J. Walsh, Murray J. Diamond, Eardell Rashford, Shyleur Barrack, Wallace Rice and Sandra Page.

Since there is no charge that the defendant judges Walsh,Sandifer and Thompson acted "in the absence of all jurisdiction," they are entitled to judicial immunity. See Doe v. McMillan, 412 U.S. 306, 319 (1973); Pierson v. Ray, 386 U.S. 547, 553-54 (1967); E. M. Blouin v. Dembitz, 489 F.2d 488, 491 (2d Cir. 1973); Fanale v. Sheehy, 385 F.2d 866, 868 (2d Cir. 1967). Murray Diamond is sued only on the basis of his relationship with Mrs. Burke's son, in whose behalf Mrs. Burke has no standing to sue, as discussed above.

Messrs. Barrack and Rashford are essentially charged with malpractice in handling an eviction suit between Mrs. Burke and landlord Rice. Mr. Rice is apparently charged with malicious prosecution and defrauding Mrs. Burke of $200.00. Ms. Page is charged with assault and the only relief sought against her is the commencement of a criminal action, relief

which this Court is powerless to grant. Where, as here, there is no diversity jurisdiction, it is axiomatic that such controversies must be relegated to the state courts for disposition.

It is therefore clear that, as sympathetic as I might be with Mrs. Burke in the Kafkaesque torments she allegedly has suffered, I have no alternative but to dismiss her complaint. However, because I want to afford her every opportunity to state her case in a manner which will satisfy the minimum jurisdictional and procedural requirements, the dismissal is without prejudice to plaintiff's filing, within thirty (30) days, a new complaint complying with the standards outlined above.

SO ORDERED.

WILLIAM C. CONNER

United States District Judge

Dated: New York, New York
November 17, 1975

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

CA 75-6141

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia,

being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

15th day of March, 19 76 she served a copy of the

within govt's brief

by placing the same in a properly postpaid franked envelope

addressed: 1) Mabel Dyson Burke, 226 West 22nd St. NY NY 10027
2) W. Bernard Richland, Corporation Counsel Municipal Bldg. NY NY 10007
3) Louis J. Lefkowitz, Atty Gen. NY State Dept of Law 2 World Trade Center, NY NY 10047 4) Robert M. Morgenthau, Distr. Atty NY County 155 Leonard St. NY NY 10013 5) Diamond & Dreifuss, Esqs., 401 Bway NY NY 10013
6) Paul L. Llein, Esq., The Legal Aid Society 11 Park Place, NY NY 10007
7) Jerome E. Goldman, Esq., 401 Bway NY NY 10013

And deponent further says she sealed the said envelope s and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

15th day of March, 19 76